UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

THOMAS C. CERRONE,

Plaintiff,

-against- **95-CV-241**

Michael F. Cahill, Francis A. Defrancesco, Salvatore S. Valvo, Thomas M. Fresenius, Scott L. Brown, Richard G. Morse, Deborah L. Komar, Jonathan Z. Friedman and Gerald W. Connolly, Individually,

Defendants.

DECISION & ORDER

McAvoy, D.J.

I. BACKGROUND

A. Procedural Background

Plaintiff Thomas Cerrone ("Cerrone"), a New York State Trooper, commenced the instant action asserting claims pursuant to 42 U.S.C. § 1983 as well as state law claims for false arrest, false imprisonment, and intentional infliction of emotional distress. Cerrone's claims arise out of Defendants' investigation of an alleged cover-up by Cerrone and other New York State Troopers of a hit-and-run accident that occurred on April 3, 1993. The case has wound its way through the courts with numerous decisions on substantive matters issued by this Court, see Cerrone v. Cahill,

95-CV-241, Order, Aug. 25, 1995, Dkt. # 21; Cerrone v. Cahill, 95-CV-241, Order, June 24, 1997, Dkt. # 62; Cerrone v. Cahill, 95-CV-241, Stipulation and Order, July 12, 1999 (Smith, M.J.), Dkt. # 94; Cerrone v. Cahill, 84 F. Supp.2d 330 (N.D.N.Y. Jan. 28, 2000), Dkt. # 111, vacated and remanded, 246 F.3d 194 (2d Cir. April 10, 2001); Cerrone v. Cahill, 95-CV-241, Decision and Order, June 7, 2001, Dkt. # 121, and one by the Second Circuit Court of Appeals. Cerrone v. Cahill, 246 F.3d 194 (2d Cir. 2001). Familiarity with these decisions is presumed.

At present, only Cerrone's claims against Defendants Michael F. Cahill, Salvatore S. Valvo, and Richard G. Morse remain active.[1] The three defendants remaining in this action (Cahill, Valvo, and Morse), who are all represented by the same counsel, now make a consolidated motion for summary judgment seeking to dismiss all claims against them, and, seeking sanctions against the Plaintiff pursuant to Rule 11 of the Federal Rules of Civil Procedure.

B. Factual Background

For purposes of the pending summary judgment motion, it is

[1] On July 12, 1999, Magistrate Judge Ralph W. Smith, Jr. signed a Stipulation and Order which discontinued on the merits claims asserted in the Plaintiff's Amended Complaint against Defendants Defrancesco, Komar, Friedman and Connolly, as well as all claims arising out of the events of January 20, 1995. See Dkt. # 94. In the June 6, 2001 Decision and Order, the Court reviewed the Defendants Brown and Fresenius' motion for summary judgment on remand from the Second Circuit and dismissed all claims pending against these two defendants. See Dkt # 121.

important to clarify the remaining defendants' roles in the January 19, 1995 arrest of Mr. Cerrone and to delineate the facts leading up to that arrest which are not in dispute.

After the Superintendent of the New York State Police received a letter in September, 1994 alleging, *inter alia*, that State Trooper Timothy Knapp participated in a cover-up of the afore-mentioned hit-and-run accident, the Superintendent assigned State Police Captain Thomas Fresenius, Lieutenant Scott Brown, Bureau of Criminal Investigations (BCI) Investigator Debra Komar, and BCI Senior Investigator Richard Morse to investigate the involvement of Trooper Knapp and any other officer from Peekskill Barracks Troop K in the potential cover-up. Plt.'s Mem. of Law, p. 2-3. These investigative officers were under the supervision of Inspector Michael Cahill. Id. Inspector Salvatore S. Valvo joined the investigative team at a later date but prior to Cerrone's arrest. See Complaint, ¶¶ 5, 24.

As indicated in previous decisions, there is a dispute as to some of the information defendants learned during their investigation and as to how this information would be viewed by a reasonable fact finder under the parties' varying versions. There is no dispute, however, regarding the following information or, to the extent there is disagreement, the facts are recited in the light most favorable to the non-movant.

The investigative team learned that on April 3, 1993, New York

State Trooper Robert Gregory of the Peekskill barracks was the first officer to respond to the hit-and-run accident scene. Cerrone, a New York Police Sergeant and Commander of the Peekskill Barracks' Troop K, also responded to the scene. Information provided to Cerrone at the scene, and which impacts the probable cause determination made by the investigative team on January 19, 1995, is the primary focus of the following facts. Thus, unlike in previous decisions, the information is significant not necessarily from the perspective of what Plaintiff Cerrone did or did not do when he left the scene on April 3, 1993, but rather, from the perspective of what could be inferred from the omission of certain relevant information on police documents which Cerrone undoubtedly had first-hand knowledge about.

1. Affidavit of Maureen Frances Hunt

On October 25, 1994, the investigative team obtained an affidavit from Maureen Frances Hunt, the driver of one of the automobiles involved in the April 3, 1993 accident. Ms. Hunt was not the person believed to have caused the accident and did not flee the scene as did the ostensibly culpable driver. Ms. Hunt's affidavit indicates, *inter alia*, that after the other vehicle struck her, she exited her vehicle and was in a position to observe both the driver and the automobile which struck her. She was able to provide to the police a description of the driver of the other

vehicle,[2] a general description of the automobile that struck her,[3] a partial license plate number of that automobile,[4] and the direction that the automobile was traveling when it left the scene.[5] Hunt, Aff., p.1 -2. Ms. Hunt also indicated in her affidavit that while she was at the scene, she saw another vehicle turn around and begin following the hit-and-run vehicle heading south on Route 9. Id. She later learned that the person who followed the hit-and-run driver was a friend named Sharon Ryder. Ms. Hunt recounted for the investigators that Ms. Ryder returned to

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[2] "[A] white male with fair hair, light skin and it looked as though his cheeks were hollowed in."

[3] "It was a two-tone yellow large car and older model, probably in the seventies."

[4] There is some dispute regarding the license plate number. Ms. Hunt's October 25, 1994 affidavit provides as follows:

> Despite [the other driver's] actions [in trying to back into me after I exited my vehicle] I was able to get all six digits of his plate number M.H. ~~and I'm pretty sure they were all correct~~. M.H. I know at least the first three digits were definitely TTZ.

Hunt Aff.

The Plaintiff argues that the language that was struck out and initialed by "Maureen Hunt" raises a "significant issue" as to whether or not Ms. Hunt actually was able to recount the six digits accurately.

[5] "After the other driver backed towards me, he headed south on Route 9. There was another car at the stop sign on highland and I was waiving and yelling about the car leaving the accident. The guy that hit me continued south on route 9. His car had no headlight on the right side but he still had taillights. The car that had been at the stop sign turned to follow him."

the scene and reported that she [Ms. Ryder] had followed the hit-and-run driver south on Route 9 to the Texaco Station at the Annsville Circle. Id. Ms. Ryder reported that she saw the driver out of the car leaning over what she [Ms. Ryder] thought was a telephone. Importantly, Ms. Hunt attests that both she and Ms. Ryder informed the officers at the scene, including Plaintiff Cerrone, that "the guy was right down at the Texaco Station." Hunt, Aff. P. 2. As all parties appear to agree, the Texaco Station on the Annsville Circle was located approximately one mile south on Route 9 from the hit-and-run accident scene and virtually next door to the Troop K barracks. See Brown June 10, 1999 Aff., ¶ 51.

2. Supporting Deposition of Sharon Ryder

The investigative team also obtained a sworn "Supporting Deposition" dated October 26, 1994 from Sharon Ryder. This recounted essentially the same facts as attested to by Ms. Hunt but from the first-hand perspective. Ms. Ryder indicated that she recognized "Tom Cerrone" at the accident scene because she had "gone to school with" him and therefore knew him personally. Ryder Supp. Dep., p. 2. She also attested that she conveyed to the police the information regarding the hit-and-run automobile which she followed, asserting: "I remember being kind of excited and feeling that no one was very concerned, Tom Cerrone had come up from the south and when he left he went south again so I figured maybe he was going to check it out and look for the guy." Ryder

Sup. Dep., p. 2. Ms. Ryder further attested:

> At the scene of the accident, I know I told the first trooper that I had followed the guy and I believed that he was at the Annsville gas station. I don't know if he took my name and phone number. I was not asked to give a statement at any time and was never contacted at a later time. I remember when Tom Cerrone stopped at the scene that the first trooper, the young guy, told him that I followed the guy and that I thought he was right down at the Annsville gas station. The station is about a mile down the road from where the accident was. That's why when Tom Cerrone left the accident I assumed that he went to look for the guy.

Ryder. Sup. Dep., p. 3.

Further investigation yielded a Supporting Deposition dated November 10, 1994 from Dawn Hutchings Brissett and a Supporting Deposition from Margaret A. Murphy dated January 9, 1995. Both provided further insight into the connection between the hit-and-run driver and a possible cover-up by officers within Troop K.

3. Supporting Deposition of Dawn Hutchings Brissett

Ms. Brissett had been involved in an eight year romantic relationship with Rory Knapp, the person believed to have been the hit-and-run driver on April 3, 1993. She indicated that "one Saturday night in March or April of 1993" she received a telephone call from Rory Knapp. Brissett Sup. Dep., p. 1. Mr. Knapp stated that he had been in an automobile accident and left the scene and went to the Texaco Station on Route 9 where he "called the accident in" but did not report that he was involved in the accident. He indicated further, at least according to Ms. Brissett, that he thought someone had followed him to the Texaco Station and

therefore he parked the car behind the gas station.

According to Ms. Brissett, Mr. Knapp advised at a latter time he eventually moved the car and hid it beside his brother, Trooper Timothy Knapp's, house. Id. p. 2. Rory Knapp further indicated to Ms. Brissett that there was damage on the car's right side from "front to back" and that his brother "was nervous about the car being at the house after it was involved in a hit and run accident, and told Rory to get the car out of the driveway." Id. p. 2-3. Mr. Knapp indicated that he then made arrangements to have the automobile destroyed. Id.

Ms. Brissett provided other information from Mr. Knapp which indicated that Mr. Knapp had received inside information regarding the official investigation into the accident. In this regard, Ms. Brissett's affidavit indicates:

> Right after the accident I wanted to turn the plates in because I didn't want to pay insurance on a car I didn't have anymore. Rory kept telling me to wait before I turned the plates in because he was afraid that with them having the plate number that someone might put everything together. Rory knew that someone had gotten his plate number the night of the accident but that they had mixed some of the numbers up so it wasn't exact.
>
> Rory also knew that his hat and shirt, I think it was a Daytona shirt, had flown out of the car at the accident. He also knew that it was given to someone and it was destroyed. I don't know who had the stuff but Rory indicated that it was purposely taken care of so that Rory wouldn't get in trouble.... He also knew that whoever was in the accident supplied a description of my car.

Id., 3 (emphasis added).

4. Supporting Deposition of Margaret A. Murphy

Ms. Murphy testified in her Supporting Deposition that she was a bartender at the Stoneledge Bar and had both a professional and personal relationship with Rory Knapp. Murphy Sup. Dep. p. 1. She indicated that Mr. Knapp was a mechanic at the Annsville Texaco Station, a regular customer at the Stoneledge Bar, and a friend of Zone Sergeant Bob Welsh of the New York State Police. Id. Zone Sergeant Welsh was Cerrone's direct supervisor.[6] Brown Aff., ¶ 60. Ms. Murphy testified that sometime in 1993, shortly after Rory Knapp left the bar one evening, she received a telephone call from him at approximately 11:30 P.M. She described the contents of this telephone call as follows:

> Rory sounded very shaken and told me to promise that I wouldn't tell anyone, that he had just gotten into an accident. He told me that the accident happened down the street from the Stoneledge, just over the crest on Route 9. He went on to tell me that he hit someone head on and when he realized what happened he looked out and saw people walking around outside the car so he knew they were okay. After that he took off from the accident and drove to the Texaco station at the Annsville Circle and called Bob Welsh. Rory told me that he told Welsh about the accident he just had and Welsh told him not to worry about it, that he would take care of it. He told me that

[6] There is a factual dispute as to whether Zone Sergeant Welsh arrived at the scene with Cerrone. Ms. Hunt asserts that she believes there were three officers at the scene. Hunt. Aff., p. 2. Defendants assert that at the time of the accident, Welsh was at the Troop K Barracks and, based upon evidence linking Welsh to the cover-up, assume that he accompanied Cerrone to the scene after the call from Knapp came in. Thus, they conclude he was the third officer Ms. Hunt refers to. However, because the fact is disputed, the Court concludes for purposes of this motion that he was not at the scene.

> he called Welsh at the station, which I took to mean the State Police Station at the Annsville Circle. ... Rory told me that he called Welsh from the Texaco Station and that he thought that someone had followed him there after the accident. He was concerned that the person got his plate number, and told me that he pulled his car behind the Texaco Station where it could not be seen.

Murphy Sup. Dep. p. 2-3 (emphasis added).

Ms. Murphy also indicates that "I do remember Rory telling me that Timmy [his brother] kept telling him not to tell anyone about the accident, to keep his mouth shut." Id. p. 4. The following day, at the Stoneledge Bar, Ms. Murphy's employer presented her with two items which the employer said were brought to the bar from the accident scene. One item was a part of a car "which I saw was the same color as Rory's, Rory drove a car which was two tone gold and very unusual." Id. p. 5. The other item was a baseball cap which Ms. Murphy assumed belonged to Rory Knapp. Id. At Rory Knapp's request, Ms. Murphy disposed of both items. Id.

Ms. Murphy's supporting deposition then proceeds to state:

> Within a week or so I realized that Rory's accident was really taken care of. At first I had though that he would just get off light. But I realized that it was totally covered up. Rory told me that someone did get his plate number but they were told that the plate was run and didn't come back right or wasn't the right car for some reasons. I was told that the people from the accident or their relatives would come to the station looking for results and were told that there were no leads to the other person involved, and they were always getting frustrated.

Id.; Defs.' Local Rule 7.1 Stat., ¶ 5.

5. Supporting Deposition of Keith D. Hunt

The investigative team also obtained a Supporting Deposition from Keith D. Hunt, Maureen Hunt's husband. He attested that, *inter alia*, the morning following the accident he went to the accident scene and, on the far side of the guardrail, found a used baseball hat, a "Daytona" tee shirt, and pieces of both his wife's car and another car. K. Hunt. Sup. Dep., p. 2.

6. Police Documents Regarding April 3, 1993 Accident

Following the accident, a Police Accident Report, Form MV-104A, was prepared by Trooper Gregory. This document was provided to and initialed by Plaintiff Cerrone as Trooper Gregory's superior officer. While Cerrone concedes that he did review this form, he asserts that the "subject MV-104A form was properly completed."[7] Cerrone Aff., ¶ 36. He does not dispute, however, that the subject MV-104A form contained numerous "X" marks in areas on the document which indicate, where such "X" marks appear, that the corresponding information is "unknown." Def.'s Local Rule 7.1 Stat. ¶ 10. He does not dispute that this one-page document, with its numerous "X" marks, indicates to the knowledgeable observer that: (a) no

[7] Cerrone asserts in his Local Rules Statement, citing to his own deposition, that "Plaintiff did not review the Motor Vehicle Accident Report to determine whether 'an adequate investigation was conducted,' but rather he reviewed same to ensure that the report had been completed accurately." Plt.'s Local Rule 7.1 Stat., ¶ 11. In his affidavit in opposition to the instant motion, Cerrone attests that "[i]n reviewing the MV-104A form, my responsibility is to ensure that it is properly completed, that all boxes are filled out, that the diagram is completed." Cerrone Aff., ¶ 34.

information about the hit-and-run vehicle driver was entered despite Ms. Hunt observing the driver from close range and providing a description; (b) there is no indication of the color, description, or plate number (even the first three letters) of the car despite the fact that this information was conveyed to the officers by at least two witnesses; (c) the document makes no mention at all of Sharon Ryder, the eye witness to the flight of the hit-and-run driver, or of the last sighting of the perpetrator at the nearby Texaco Station, despite the fact that this woman, who knew Cerrone "from school", claims to have imparted the information directly to Cerrone (a point which Cerrone himself corroborates);[8] and (d) there is no indication of any "leads" discovered despite the fact that someone brought parts of Rory Knapp's automobile to the Stoneledge Bar and, the next day, Ms. Hunt's husband was able to find a tee-shirt and hat which, according to witness statements, belonged to Rory Knapp, as well as additional pieces of two automobiles still at the scene. See Cerrone Aff. ¶ 24.

In addition, Gregory made two entries in the police log regarding the accident. The first entry was on April 3, 1993. Like the MV-104A, it contained no information regarding the hit-and-run vehicle (e.g. no color, model year, plate number [or partial plate number], direction of travel upon leaving the scene, location of,

[8]Further, there is no dispute that once given this information by Ms. Ryder, Cerrone left the scene and proceeded to the Annsville Circle to look for the vehicle. Cerrone Aff. ¶¶ 24-27.

or last sighting), no description of the driver, nor any mention of the eye-witness despite the fact that all of this information had been supplied to Trooper Gregory and most, if not all, supplied to Cerrone.

The second entry, made ten days after the accident, provides that "further investigation revealed no new clues, leads, suspects. Operator of Vehicle 1 could offer no new information, Mv104A submitted." Brown Aff., ¶ 45. Defendants assert that Cerrone, as Station Commander, could reasonably be expected to be aware of activities related to the hit-and-run investigation, especially in light of the fact that he personally participated in the investigation. Cerrone asserts, simply, that "[a]s Station Commander I am not required to read all blotter entries from the Station." Cerrone Aff., ¶ 35.

The record on this motion is unclear whether Cerrone read these entries,[9] or whether a procedure existed for any review of the blotter entries. For purposes of this motion, it is assumed he did not read these two police blotter entries or that he was required to do so. Reference is made to them only to the extent

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[9] See Cerrone v. Cahill, 246 F.3d at 197: "Appellant Brown learned from witnesses that the victim had provided Gregory with a description of the car, a partial license plate number, and items of the perpetrator's clothing found at the accident scene. However, it was apparent from a review of Gregory's report that Gregory did not follow up on these leads; instead he wrote in his report that 'further investigation revealed no new clues, leads, suspects. Operator of Vehicle 1 could offer no new information.' Cerrone signed Gregory's report as a supervisor."

that they incorporate the MV-104A form (which Cerrone did review and sign) into the official investigative record at the Troop K Barracks, and to the extent that this last fact may indicate to an objective reviewer that there was a concerted effort within Troop K to cover up Rory Knapp's crime.

7. Other investigative efforts

Still further, the uncontroverted evidence indicates that before Cerrone was arrested on January 19, 1995, the investigative team engaged in other intensive forms of investigation including intercepting and recording the conversations of Trooper Welsh and Rory Knapp during which there was mention of several officers being involved in a cover-up scheme. See Collins Aff., Ex. R.

On January 4 & 17, 1995 the investigative team held meetings, one of which included Gerald Connolly of the Westchester County District Attorney's Office, to discuss possible criminal charges arising out of the cover-up. At the January 17th meeting, it was decided that team members would stop Plaintiff Cerrone for questioning regarding Cerrone's possible participation in the cover-up.

8. Cerrone's Arrest & Detention

On January 19, 1995, as he was driving home from work, Cerrone was pulled over by an unmarked police car flashing its "grill lights." Inspector Valvo approached Cerrone, ordered him out of car, and took his keys. Plt.'s Mem. of Law, p. 5. Inspector Valvo

was joined by Senior Investigator Morse, and Cerrone was then placed in the backseat of the Inspector's vehicle where he was "guarded by Defendant Senior Investigator Richard G. Morse." Plt.'s Mem. of Law, p. 6. Cerrone was then transported to a local hotel where he was questioned for some six hours by Lt. Brown and Inspector Cahill and then released. Id.[10]

II. DISCUSSION

Defendants' motion for summary judgment is based on a number of arguments, *inter alia*, that the arrest in issue was made with probable cause and therefore there is no basis for the false arrest and false imprisonment claims; that the defendants are entitled to qualified immunity; and that summary judgment is warranted on the Plaintiff's state law intentional infliction of emotional distress claim because Plaintiff cannot offer sufficient evidence to sustain such a claim under New York law. Plaintiff opposes the motion and raises numerous arguments countering the Defendants' positions. The Court will address the arguments *seriatim*.

A. Probable Cause for Arrest

The elements of a cause of action for false arrest brought under the Fourth Amendment and state common law are the same.

[10] The Court notes that the defendants assert that Plaintiff was not arrested because he willingly accompanied the officers to the hotel and was repeatedly advised that he was free to leave but insisted he wanted to cooperate with the investigation. For purposes of this motion, the Court accepts Plaintiff's contention that he unwillingly accompanied the investigators and that he did not feel free to leave during the interrogation.

These are: (1) the defendant intended to confine the plaintiff; (2) the plaintiff was conscious of the confinement; (3) the plaintiff did not consent to the confinement; and (4) the confinement was not otherwise privileged. Weyant v. Okst, 101 F.3d 845, 853 (2d Cir. 1996); Broughton v. State of New York, 37 N.Y.2d 451, 456 (1975). Because false arrest is a type of false imprisonment, the two claims have identical elements. See Singer v. Fulton County Sheriff, 63 F.3d 110, 118 (2d Cir. 1995), cert. denied, 517 U.S. 1189 (1996).

For purposes of this motion only, the defendants have conceded that the Plaintiff has satisfied the first three elements of these causes of action. Further, the Plaintiff correctly states that under New York law a warrantless arrest is presumptively unlawful. see id. There is no dispute that the defendants did not have a warrant to arrest the Plaintiff. However, as the defendants correctly point out, if there existed probable cause for the arrest, the Plaintiff may not recover on any of these claims. Smith v. Edwards, 175 F.3d 99, 105 (2d Cir. 1999)(“It is well established that appellant's Section 1983 claims against appellees for false arrest and false imprisonment must fail if the appellee-officers had probable cause to arrest him.”); Curley v. AMR Corp., 153 F.3d 5, 13 (2d Cir. 1998); Weyant, 101 F.3d at 852 (probable cause is a complete defense to both federal and state law claims for false arrest and false imprisonment); Zanghi v. Incorporated Village of

Old Brookville, 752 F.2d 42 (2d Cir. 1988).

Probable cause exists when officers "have knowledge or reasonably trustworthy information of facts and circumstances that are sufficient to warrant a person of reasonable caution in the belief that the person to be arrested has committed or is committing a crime." Posr v. Court Officer Shield No. 207, 180 F.3d 409, 414 (2d Cir. 1999). The existence of probable cause must be determined on the basis of the totality of the circumstances. Calamia v. City of New York, 879 F.2d 1025, 1032 (2d Cir. 1989). The inquiry is an objective one and the subjective beliefs or motivations of the arresting officer are irrelevant. Whren v. United States, 517 U.S. 806, 813 (1996); Martinez v. Simonetti, 202 F.3d 625, 633 (2d Cir. 2000); United State v. Scopo, 19 F.3d 777, 780-82 (2d Cir. 1994), cert. denied, 513 U.S. 877 (1994); Broughton, 37 N.Y.2d at 458-459 ("A valid arrest will not be rendered unlawful by malicious motives"); Restey v. Higgins, 675 N.Y.S.2d 725, 727 (4th Dep't 1998) (same).

In evaluating the probable cause determination, the Court "consider[s] the facts available to the officer at the time of the arrest." Ricciuti v. N.Y.C. Transit Auth., 124 F.3d 123, 128 (2d Cir. 1997) (citing Lowth v. Town of Cheektowaga, 82 F.3d 563, 569 (2d Cir. 1996)). "[I]t is well-established that a law enforcement official has probable cause to arrest if he received his information from some person, normally the putative victim or

eyewitness." Miloslavsky v. AES Eng'g Soc'y, 808 F.Supp. 351, 355 (S.D.N.Y. 1992), aff'd, 993 F.2d 1534 (2d Cir. 1993).

Where the facts surrounding the arrest are uncontroverted, the determination as to whether probable cause existed may be made by the court as a matter of law. Weyant, 101 F.3d at 852. On a motion for summary judgment, however, the court must determine whether there are any "genuine issues" as to any material facts. Anderson v. Liberty Lobby, 477 U.S. 242, 249 (1986). Therefore, where the question of probable cause is "predominately factual in nature," the determination should be made by a jury. Murphy v. Lynn, 118 F.3d 938, 947 (2d Cir. 1997), cert. denied, 522 U.S. 1115 (1998).

In contrast to the arguments raised by defendants Brown and Fresenius which focused primarily on whether the controvertible facts of what Cerrone did during his investigation could form the basis of a probable cause determination (e.g., whether the fact that he did not discover the car at the Texaco Station could form the basis of the probable cause determination), on this motion the defendants focus on the uncontroverted facts leading up to his January 19, 1997 arrest to support their probable cause argument. The Court will address these arguments in the order made.

1. Probable Cause from Traffic Violation

Defendants first argue that probable cause existed because at the time of the stop, Cerrone was driving an unregistered motor

vehicle in violation of New York Vehicle and Traffic Law § 401(4). Therefore, defendants assert, they had probable cause to stop and arrest Cerrone pursuant to New York Criminal Procedure Law §140.10(1)(a).[11] Plaintiff counters that, while he was driving an unregistered vehicle in violation of New York Vehicle Traffic Law § 401, he was never cited for the infraction and the facts of the case, including the substance of his interrogation, indicate unequivocally that the detention was not for purposes related to this minor traffic infraction. Further, he argues that the ensuing detention by the defendant officers was in violation of New York Criminal Procedure Law §140.20.[12]

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[11] §140.10 of the New York State Criminal Procedure Law, entitled Arrest without a warrant; by police officers; when authorized, provides in pertinent as follows:

> 1. Subject to the provisions of subdivision two, a police officer may arrest a person for:
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> > (a) Any offense when he has reasonable cause to believe that such person has committed such offense in his presence;

N.Y. Crim. Pro. L. §140.10. (West Group, 2001). "'Reasonable cause', as used in the New York statute, is substantially the same as 'probable cause' within the meaning of the fourth amendment." Kruppenbacher v. Mazzeo, 744 F.Supp. 402 (N.D.N.Y. 1990).

[12] New York Criminal Procedure Law § 140.20, entitled Arrest without a warrant; procedure after arrest by police officer, provides in pertinent part as follows:

> 1. Upon arresting a person without a warrant, a police officer, after performing without unnecessary delay all recording, fingerprinting and other preliminary police duties required in the particular case, must except as

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otherwise provided in this section, without unnecessary delay bring the arrested person or cause him to be brought before a local criminal court and file therewith an appropriate accusatory instrument charging him with the offense or offenses in question. The arrested person must be brought to the particular local criminal court, or to one of them if there be more than one, designated in section 100.55 as an appropriate court for commencement of the particular action; except that:

> (a) If the arrest is for an offense other than a class A, B, C or D felony or a violation of section 130.25, 130.40, 205.10, 205.17, 205.19 or 215.56 of the penal law committed in a town, but not in a village thereof having a village court, and the town court of such town is not available at the time, the arrested person may be brought before the local criminal court of any village within such town or, any adjoining town, village embraced in whole or in part by such adjoining town, or city of the same county; and
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> (b) If the arrest is for an offense other than a class A, B, C or D felony or a violation of section 130.25, 130.40, 205.10, 205.17, 205.19 or 215.56 of the penal law committed in a village having a village court and such court is not available at the time, the arrested person may be brought before the town court of the town embracing such village or any other village court within such town, or, if such town or village court is not available either, before the local criminal court of any adjoining town, village embraced in whole or in part by such adjoining town, or city of the same county; and
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> (c) If the arrest is for an offense committed in a city, and the city court thereof is not available at the time, the arrested person may be brought before the local criminal court of any adjoining town or village, or village court embraced by an adjoining town, within the same

(continued...)

[12](...continued)

county as such city; and

(d) If the arrest is for a traffic infraction or for a misdemeanor relating to traffic, the police officer may, instead of bringing the arrested person before the local criminal court of the political subdivision or locality in which the offense was allegedly committed, bring him before the local criminal court of the same county nearest available by highway travel to the point of arrest.

2. If the arrest is for an offense other than a class A, B, C or D felony or a violation of section 130.25, 130.40, 205.10, 205.17, 205.19 or 215.56 of the penal law, the arrested person need not be brought before a local criminal court as provided in subdivision one, and the procedure may instead be as follows:

(a) A police officer may issue and serve an appearance ticket upon the arrested person and release him from custody, as prescribed in subdivision two of section 150.20; or

(b) The desk officer in charge at a police station, county jail or police headquarters, or any of his superior officers, may, in such place fix pre- arraignment bail and, upon deposit thereof, issue and serve an appearance ticket upon the arrested person and release him from custody, as prescribed in section 150.30.

3. If (a) the arrest is for an offense other than a class A, B, C or D felony or a violation of section 130.25, 130.40, 205.10, 205.17, 205.19 or 215.56 of the penal law, and (b) owing to unavailability of a local criminal court the arresting police officer is unable to bring the arrested person before such a court with reasonable promptness, either an appearance ticket must be served unconditionally upon the arrested person or pre-arraignment bail must be fixed, as prescribed in subdivision two. If pre- arraignment bail is fixed but not posted, such arrested person may be temporarily held in custody but must be brought before a local criminal

(continued...)

The Court finds that the defendants did have probable cause to stop the Plaintiff's vehicle due to the traffic infraction. United States v. Scopo, 19 F.3d at 781. Having had probable cause to stop Plaintiff and because the officers personally observed Plaintiff operating the vehicle in violation of N.Y. VEH. & TRAFFIC LAW § 410, they were authorized under state law to make a formal arrest, N.Y. CRIM. PRO. LAW § 140.10(1)(a), and thus had probable cause to reasonably detain him. Scopo, 19 F.3d at 781-82.

"The Supreme Court has made clear that, under the Fourth Amendment, law enforcement officers may stop an individual for any lawful reason, regardless of the subjective intentions of the individual officers involved." United States v. Owens, 142 F. Supp.2d 255, 262 (D. Conn. 2001)(citing Whren, 517 U.S. at 813-14). Likewise, the Second Circuit has held that "an officer's use of a

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[12](...continued)
court without unnecessary delay. Nothing contained in this subdivision requires a police officer to serve an appearance ticket upon an arrested person or release him from custody at a time when such person appears to be under the influence of alcohol, narcotics or other drug to the degree that he may endanger himself or other persons.

4. If after arresting a person, for any offense, a police officer upon further investigation or inquiry determines or is satisfied that there is not reasonable cause to believe that the arrested person committed such offense or any other offense based upon the conduct in question, he need not follow any of the procedures prescribed in subdivisions one, two and three, but must immediately release such person from custody.

traffic violation as a pretext to stop a car in order to obtain evidence for some more serious crime is of no constitutional significance," and that "an observed traffic violation legitimates a stop even if the detectives do not rely on the traffic violation." United States v. Dhinsa, 171 F.3d 721, 724-25 (2d Cir. 1998).

Plaintiff concedes that at the time he was stopped, he was driving an unregistered vehicle. The fact that the defendants may have had a subjective motive for the stop separate from the apparent vehicle and traffic law violation is of no moment. See Mason v. Town of New Paltz Police Department, 103 F. Supp.2d 562, 566 (N.D.N.Y. 2000)(Mordue. D.J.)(Plaintiffs' contention that the police officers were motivated not by complaint but rather by bad faith does not raise a triable issue)(citing Whren, 517 U.S. at 813; Scopo, 19 F.3d at 782-83; Broughton, 37 N.Y.2d at 458-459).

Based upon these holdings and the New York statutes, there can be no quarrel that the objective circumstances, quite apart from the subjective intent of the officers, justified the stop and the *initial* arrest of Mr. Cerrone. The Court is not convinced, however, that the ensuing six hours of interrogation was "justified" by the "probable cause" arising from Cerrone's operation of the unlicenced vehicle. Indeed, there is no argument proffered by the defendants that the session at the hotel was used in *any* manner to solve the traffic infraction. Rather, the parties agree that whatever the

exact nature of the next six hours - whether consensual interview or custodial interrogation - the focus was on the 1993 hit-and-run accident and Cerrone's role in a potential cover-up.

Further, this case is distinguishable from the several "pre-text stop" cases because no probable cause to believe that Cerrone committed any crime arose from circumstances of the stop. That being the case, the defendants must establish an independent basis of probable cause to justify the detention at the hotel that exceeded the authority allowed by New York Criminal Procedure Law § 140.20.

2. Probable Cause to Interrogate

Defendants argue that even assuming that they did not have probable cause to detain Mr. Cerrone from the unlicenced operation violation, they had probable cause to believe he had committed a crime based upon the facts disclosed in their investigation. In this regard, the defendants argue that at the time of the stop, they possessed probable cause to believe that Plaintiff acted in complicity in the illegal attempt to cover up the hit-and-run accident. The Court agrees.

Based upon documents submitted previously in this case, the Court is aware that Troopers Gregory and Welsh were charged in Indictment No. 95-0191 out of Westchester County with: Tampering with Public Records in the First Degree in violation of New York

State Penal Law § 175.25 (Gregory, Count 12);[13] Offering a False Instrument for Filing in the First Degree in violation of New York State Penal Law Section 175.35 (Gregory, Count 13);[14] Tampering with Physical Evidence in violation of New York Penal Law Section 215.40(02)(Gregory, Count 14);[15] and Official Misconduct in

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[13] § 175.25 Tampering with public records in the first degree

A person is guilty of tampering with public records in the first degree when, knowing that he does not have the authority of anyone entitled to grant it, and with intent to defraud, he knowingly removes, mutilates, destroys, conceals, makes a false entry in or falsely alters any record or other written instrument filed with, deposited in, or otherwise constituting a record of a public office or public servant.

Tampering with public records in the first degree is a class D felony.

[14] § 175.35 Offering a false instrument for filing in the first degree

A person is guilty of offering a false instrument for filing in the first degree when, knowing that a written instrument contains a false statement or false information, and with intent to defraud the state or any political subdivision, public authority or public benefit corporation of the state, he offers or presents it to a public office, public servant, public authority or public benefit corporation with the knowledge or belief that it will be filed with, registered or recorded in or otherwise become a part of the records of such public office, public servant, public authority or public benefit corporation.

Offering a false instrument for filing in the first degree is a class E felony.

[15] § 215.40 Tampering with physical evidence

A person is guilty of tampering with physical evidence when:

* * *

2. Believing that certain physical evidence is about to be produced

(continued...)

violation of New York Penal Law Section 195.00 (Gregory Count 15; Welsh Count 16).[16] Collins Aff., Jan. 25, 1996, Ex. B [Dkt. No. 37]; See Cahill v. O'Donnell, 7 F. Supp.2d 344, 345-46 (S.D.N.Y. 1998).[17] Based upon the uncontroverted facts, the Court finds as a

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[15](...continued)
or used in an official proceeding or a prospective official proceeding, and intending to prevent such production or use, he suppresses it by any act of concealment, alteration or destruction, or by employing force, intimidation or deception against any person.

Tampering with physical evidence is a class E felony.

[16] § 195.00 Official misconduct

A public servant is guilty of official misconduct when, with intent to obtain a benefit or deprive another person of a benefit:

1. He commits an act relating to his office but constituting an unauthorized exercise of his official functions, knowing that such act is unauthorized; or

2. He knowingly refrains from performing a duty which is imposed upon him by law or is clearly inherent in the nature of his office.

Official misconduct is a class A misdemeanor.

[17] In a lawsuit brought in federal court in the Southern District of New York by the three remaining defendants in this action against various members of the New York State Police for conduct involving, in part, these defendants' role in Cerrone's arrest, District Court Judge Barrington D. Parker, Jr. noted as follows:

> In April 1995, Welsh, Gregory, and Knapp were arrested and charged with crimes related to the alleged hit-and-run accident and the subsequent cover-up. None of the three was exonerated. Welsh pleaded guilty to criminal misconduct and agreed to retire from the State Police. Knapp pleaded guilty to criminal charges and received a one year jail sentence. Gregory pleaded guilty to administrative charges, and the criminal charges against

(continued...)

matter of law that probable cause to arrest Plaintiff existed on January 19, 1995 on charges similar to which Troopers Gregory and Welsh were eventually charged, or, at a minimum, probable cause existed to believe that Cerrone aided and abetted the illegal acts of Trooper Gregory. See NY Penal Law § 20.00.

The uncontroverted facts reveal that on April 3, 1993, Mr. Cerrone was advised by an eye-witness that the hit-and-run driver was located just a mile down the road. Necessarily, in order to find the vehicle (which Cerrone concedes he attempted to do), he needed to have some description of the vehicle. Yet, despite first hand knowledge of the existence of an eye-witness, a description of the automobile, direction of flight, and last-known location of the hit-and-run vehicle, none of this information was contained on the MV-104A form which Plaintiff tacitly authorized by initialing as a superior officer.

Cerrone asserts that while "Division of New York State Troopers regulations require that a Sergeant review all MV-104A forms," Cerrone Aff. ¶ 37, he fulfilled this obligation by ensuring that all the boxes were filled out. He further claims that the regulations do not require entry "of partial information and investigative leads." Cerrone Aff. ¶ 38. This argument defies

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[17](...continued)
him were dismissed.

7 F. Supp.2d at 345-46.

logic. Absent entry of pertinent information including witness identification on the MV-104A or the police blotter (which in this case is clearly based upon the MV-104A), the institutional record is void of *any* indication of leads in this matter. More importantly, even if the Troopers were not required to include "partial information and investigative leads" in the MV-104A, this does not negate the logical, objective conclusion that the MV-104A is "properly filled out" only when it contained the correct information such as witness identification, description of the car, direction of travel from the scene, and last sighting - none of which is "partial" information.

Nonetheless, even accepting Cerrone's contention that he was required to review the MV-104A only "to ensure that the report had been completed accurately," Plt.'s Local Rule 7.1 Stat., ¶ 11, an objectively reasonable review of the form reveals that he failed in this obligation. Stating on the form that witness identification or vehicle description is "unknown" constitutes an affirmative omission of a "known" fact. Thus, these material omissions, which were known to the investigating officers *via* Ms. Hunt and Ms. Ryder's affidavits, objectively indicates that probable cause existed to believe that Cerrone acted in complicity with Trooper Gregory's attempt to omit material, relevant, and important information from an official document that would be filed. Further, probable cause existed to believe that by placing the

"unknown" designation in place of information that was, in fact, known, the document contained affirmatively false information intended to hamper the investigation and prosecution of Rory Knapp.

This conclusions is even more compelling in light of the plethora of evidence available to the investigating officers in the form of sworn affidavits and supporting depositions, obtained before arresting Cerrone, tending to indicate a concerted effort coming out of the Troop K Barracks to protect Rory Knapp from rightful prosecution as well as to supply him with information regarding the investigation into his crime. Given the connection between the driver of the hit-and-run vehicle and Zone Sergeant Welsh, there were sufficient facts to conclude, from an objective standpoint, that the cover-up was from the ground up, including Cerrone. Whether Welsh accompanied Cerrone on April 3, 1993 to the scene or to search for the vehicle, the objective evidence available to the investigative team revealed that the hit-and-run driver made a telephone call to the station immediately after the accident, spoke to Welsh who in turn told Knapp that he would "take care of" the accident. Cerrone had personal knowledge of pertinent information which was omitted from the MV-104A (which Cerrone admittedly reviewed) which might have linked the driver to the crime. Further, there was evidence that the particulars of the investigation, and the efforts, or, more appropriately, the lack of efforts, in the investigation were being conveyed to Knapp.

"A probable cause determination does not require proof beyond a reasonable doubt; it is the mere probability of criminal activity, based on the totality of the circumstances, that satisfies the Fourth Amendment." Hahn v. County of Otsego, 820 F.Supp. 54, 55 (N.D.N.Y. 1993), aff'd, 52 F.3d 310 (2d Cir. 1995). "In fact, the eventual disposition of the criminal charges is irrelevant to the probable cause determination." Id. (citing Pierson v. Ray, 386 U.S. 547, 555 (1967)). The totality of the uncontroverted, reasonably trustworthy facts and circumstances known to the investigative officers at the time of Cerrone's arrest, viewed objectively, lead unequivocally to the conclusion that the officers possessed information sufficient to warrant the belief of a person of reasonable caution that Cerrone had, at a minimum, aided or abetted Trooper Gregory's crimes.

Therefore, the Court **GRANTS** the Defendants' motion as to all claims premised upon the theory of false arrest or false imprisonment, and these claims are hereby **DISMISSED** with prejudice.

B. Qualified Immunity

Given the above, the Court need not address the parties' arguments on the issue of qualified immunity. However, precisely because of the concerns for judicial economy which formed the basis of the First Circuit's ruling in Guzman-Rivera v. Rivera-Cruz, 98 F.3d 664, 667 (1st Cir. 1996), discussed *infra*, the Court will address the defense as an alternative holding.

Plaintiff has not asserted that Cahill, Valvo, and Morse are not similarly situated to defendants Brown and Fresenius with regard to qualified immunity. Rather, Plaintiff argues that the remaining defendants (Cahill, Valvo, and Morse) have forfeited their right to assert the defense of qualified immunity because they have failed to raise the argument before this time. The Court will address this threshold argument first.

1. Qualified Immunity - When Available/When Waived?

Personal immunity defenses such as qualified immunity protect defendants in Section 1983 actions who are sued in their individual capacities. See, e.g., Hafer v. Melo, 502 U.S. 21, 25 (1991); Kentucky v. Graham, 473 U.S. 159, 166-67 (1985). The defense "serves important interests in our political system," Sound Aircraft Servs., Inc. v. Town of East Hampton, 192 F.3d 329, 334 (2d Cir. 1999), ensuring that damages suits do not "unduly inhibit officials in the discharge of their duties" by burdening individual officers with "personal monetary liability and harassing litigation." Anderson v. Creighton, 483 U.S. 635, 638 (1987); see Connell v. Signoracci, 153 F.3d 74, 79 (2d Cir. 1998).[18]

[18] Consequently, the Supreme Court has directed that "[w]here the defendant seeks qualified immunity, a ruling on that issue should be made early in the proceedings so that the costs and expenses of trial are avoided where the defense is dispositive." Saucier v. Katz, 121 S.Ct. 2151, 2155-56 (2001). "The privilege is 'an *immunity from suit* rather than a mere defense to liability; and like an absolute immunity, it is effectively lost if a case is erroneously permitted to go to trial.'" Id. at 2156 (quoting

(continued...)

Qualified immunity is an affirmative defense which must be raised in a responsive pleading and proven by the party asserting it. McCardle v. Haddad, 131 F.3d 43, 50 (2d Cir. 1997)(citing Gomez v. Toledo, 446 U.S. 635, 640 (1980) and In re State Police Litigation, 88 F.3d 111, 123 (2d Cir. 1996)); Fed.R.Civ.P. 8(c). The defense may been deemed waived where a party fails to plead it in a responsive pleading,[19] or fails to present proof upon it at trial.[20]

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[18](...continued)
Mitchell, 472 U.S. at 526); see also Hunter v. Bryant, 502 U.S. 224, 227 (1991)("we repeatedly have stressed the importance of resolving immunity questions at the earliest possible stage in litigation")*(per curiam).*

[19] See McCardle, 131 F.3d at 50; but see Eddy v. Virgin Islands Water & Power Auth., 256 F.3d 204, 210 (3rd Cir. 2001)(the defense of qualified immunity is not necessarily waived by a defendant who fails to raise it until the summary judgment stage, courts are granted discretion to allow the defense when taking into account reason for delay and any prejudice caused thereby); Guzman-Rivera v. Rivera-Cruz, 98 F.3d 664, 667 (1st Cir. 1996)("[b]ecause the doctrine of qualified immunity recognizes that litigation is costly to defendants, officials may plead the defense at various stages in the proceedings."); Anthony v. City of New York, 2001 WL 741743, at *7 (S.D.N.Y. July 2, 2001)(“Defendants who do not assert qualified immunity in their answer can still raise qualified immunity, or any other affirmative defense, at summary judgment, however, if plaintiffs cannot show that any ‘significant prejudice’ to them will result.”)(citing Rinaldi v. City of New York, 756 F. Supp. 111, 115 n. 3 (S.D.N.Y. 1990)).

[20] See Provost v. City of Newburgh, 262 F.3d 146, 2001 WL 930250, at *11-12 (2d Cir. Aug. 17, 2001)(“Because [defendant] did not specifically include a qualified immunity argument in his pre-verdict request for judgment as a matter of law, he could not have included such an argument in his post-verdict motion even had he attempted to do so.”); McCardle, 131 F.3d at 50 ("[T]he defense [of qualified immunity] cannot properly be decided by the court as a matter of law unless the defendant moves for judgment as a matter

(continued...)

Here, there is no dispute that the qualified immunity defense was pled in the defendants' Answer and that trial has not yet occurred. The defense is raised now in a pre-trial summary judgment motion *albeit* after the close of discovery and outside the time period originally specified by the Court for such dispositive motions. Plaintiff asserts that Defendants forfeited the defense because they failed to raised it in a diligent matter during the post-discovery, pre-trial phase of the case. Plt.'s Mem. of Law, p. 10 (citing Guzman-Rivera, 98 F.3d at 668). Plaintiff argues that given the length of time since the commencement of the action and the fact that the motion was not made when Defendants Brown and Fresenius made their motion for summary judgment,[21] the Court should determine that the remaining defendants have forfeited of this defense. The Court disagrees.

In some situations, a court may exercise its discretion to bar

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[20](...continued)
of law ... in accordance with Fed.R.Civ.P. 50.")(collecting cases on waiver situations); Blissett v. Coughlin, 66 F.3d 531, 538-39 (2d Cir. 1995)(waived by failure to raise it with sufficient particularity); Walsh v. Mellas, 837 F.2d 789, 799-800 (7th Cir. 1988)(where the defendants asserted the qualified immunity defense in their answer but "failed to bring the argument to the [district] court's attention, despite their having had numerous opportunities to do so" in pretrial and post trial motions and in numerous hearings, the "defendants abandoned the defense"), cert. denied, 486 U.S. 1061 (1988).

[21] Plaintiff argues that because these defendants failed to file a simple "me too" motion when Brown and Fresenius filed their motion, the remaining defendants should be deemed to have forfeited their right to do so now.

a defendant from rasing a qualified immunity defense at the pre-trial stage, Guzman-Rivera, 98 F.3d at 668 (discussed infra); English v. Dyke, 23 F.3d 1086, 1090 (6th Cir. 1994)("trial court has discretion to find a waiver if a defendant fails to assert the defense within the time limits set by the court or if the court otherwise finds that a defendant has failed to exercise due diligence or has asserted the defense for dilatory purposes."). However, Plaintiff's reliance on Guzman-Rivera for the proposition that the Court should deem the defense completely forfeited, or even that it should be forfeited at the pre-trial stage in this case, is misplaced.

In Guzman-Rivera, the defendants asserted qualified immunity after they had been to the First Circuit Court of Appeals on two prior occasions requesting rulings on immunity defenses and were before the Circuit on the third occasion requesting a ruling on their qualified immunity defense - all before the case came to trial. The district court in that case ruled that the defense was completely waived based upon the defendants' delay in raising the defense. The First Circuit "agree[d] with the finding of waiver to the extent that the district court found the qualified immunity defense waived for the pre-trial stage, and [] reverse[d] to the extent that it found the defense waived for the purposes of trial." Guzman-Rivera, 98 F.3d at 666. In reaching this conclusion the First Circuit noted that:

> [d]elay generated by claims of qualified immunity may work to the disadvantage of the plaintiff. Witnesses may become unavailable, memories may fade, attorneys fees accumulate, and deserving plaintiffs' recovery is delayed. See Apostol v. Gallion, 870 F.2d 1335, 1338 (7th Cir. 1989) ("Defendants may seek to stall because they gain from delay at plaintiffs' expense, an incentive yielding unjustified appeals."). Delay is also costly to the court system, demanding more time and energy from the court and retarding the disposition of cases.

Guzman-Rivera, 23 F.3d at 667-68.

The First Circuit found that when faced by circumstances tending to indicate that the defendant may be stalling the case for tactical reasons, courts must strike a balance between "the need to protect public officials from frivolous suits with the need to have cases resolved expeditiously." Id. In employing that balancing test, the First Circuit held that because the defendants in that case failed to raise the defense in a diligent manner and failed to offer an explanation for the delay, "the defense of qualified immunity has been waived for the pre-trial stage." Id. (emphasis added). The First Circuit did not hold that the defense was completely waived, and in fact specifically stated that "[o]ur decision thus leaves defendants free to present the qualified immunity defense at trial, despite the fact that the defense is waived for pre-trial purposes." Guzman-Rivera, 23 F.3d at 669.

Clearly, the Guzman-Rivera holding was based upon inherent judicial concerns for managing litigation in a fair and efficient manner so to protect the rights of the litigants and to preserve the scarce resources of the courts and the parties. Here, the

considerations of these same factors mitigate against this Court exercising its discretion to deem that the defendants have waived the defense. See Eddy, 256 F.3d 204 at 210 ("In particular, the Court must inquire whether the defendants violated any scheduling orders in raising the defense for the first time in their summary judgment motions, whether they delayed asserting the defense for tactical purposes or any improper reason, and, most important, whether the delay prejudiced the plaintiff's case.")

It cannot be said that these defendants somehow used the other defendants' trip to the Second Circuit Court of Appeals as a tactical strategy to delay the proceedings. They were not even party to the appeal because they had not joined in the other defendants' summary judgment motion. Based upon the facts of the case as the Court has viewed them, these defendants cannot be imputed with some improper motive aimed at delaying the proceedings simply because they did not join in the other defendants' motion which resulted in the appeal. Until the Second Circuit's April 10, 2001 Decision in this matter, Cerrone v. Cahill, 246 F.3d 194 (2d Cir. 2001), it was this Court's humble opinion that, on the record of the case as presented by the parties, questions of fact prevented the application of qualified immunity. It was only after the clarifying direction of the Circuit Court that it became apparent that these other defendants were entitled to qualified immunity. See Cerrone v. Cahill, 95-CV-241, Decision and Order,

June 7, 2001, Dkt. # 121. It is impossible to draw adverse inferences from the inaction of these defendants in this case.

Further, because it is possible that the defendants were reserving their right to raise the defense at trial,[22] this case does not stand on all fours with Hamilton v. Atlas Turner, Inc., 197 F.3d 58 (2d Cir. 1999), cert. denied, 530 U.S. 1244 (2000). In Hamilton, the Second Circuit ruled that the defendant forfeited his right to assert the "lack of personal jurisdiction" defense by not substantively addressing it until after the verdict was rendered. Here, the prospect of a trial at which time the defense could be asserted forecloses the reasoning of Hamilton.

The present motion, likewise, is not raised beyond the time constraints set by the Court. As the parties will recall, the present motion was brought on following a telephone conference with the Court during which leave to file the present motion was granted. This leave was granted out of consideration for the same fundamental concerns that prompted the First Circuit to uphold the

[22]The courts have long held that where fundamental factual disputes exist on the reasonableness of an officer's conduct, the question of qualified immunity is for a jury to decided. Kerman v. City of New York, 261 F.3d 229, 2001 WL 845442, at *8 (2d Cir. July 26, 2001)("However, the parties' versions of the facts differ markedly and '[s]ummary judgment on qualified immunity grounds is not appropriate when there are facts in dispute that are material to a determination of reasonableness.'")(quoting Thomas v. Roach, 165 F.3d 137, 143 (2d Cir. 1999); Ying Jing Gan v. City of New York, 996 F.2d 522, 532 (2d Cir. 1993)(summary judgment available on immunity issues only if undisputed facts); McCardle at 50; Blissett, 66 F.3d at 538.

waiver of qualified immunity for the pre-trial stages in Guzman-Rivera - namely, judicial concerns for managing litigation in a fair and efficient manner to protect the rights of the litigants and to preserve scarce resources of *both* the Court and litigants. Inasmuch as the qualified immunity defense would be available to the defendants at trial anyway, and given the likelihood that the remaining defendants were similarly situated with the defendants to whom the Court granted qualified immunity, the Court queried counsel during the afore-mentioned telephone conference whether the case could potentially be resolved absent a trial thereby preserving the scare resources of both the Court *and* the litigants. Based upon seemingly affirmative responses, and in an effort to serve the Supreme Court's direction to decide the defense as soon as practicable, leave was granted for the defendants to file the instant motion. Thus, it cannot be said that the motion is made in contravention of the Court's scheduling directives.

Although other motions were made by other defendants, this appears to the first motion of its kind made by these defendants. See Mitchell v. City of Boston, 130 F. Supp.2d 201, 209 (D. Ma. 2001)("this is not a situation where, as in Guzman-Rivera, the defendants had filed previous summary judgment motions that failed to raise the issue.")

Finally, Plaintiff can point to no prejudice that will befall him if the defense, which is otherwise available at the time of

trial, is decided now on this motion. See Anthony v. City of New York, 2001 WL 741743, at *7; Eddy at 210 ("With respect to this last factor, we note that [plaintiff], in his opposition to the summary judgment motion, failed to argue that he was prejudiced in any specific way by the delay.").

Based upon the above, the Court finds that the defendants have not waived, abandoned, or forfeited their affirmative defense of qualified immunity and that it is properly raised on this motion at this time.

2. Qualified Immunity - Application

Turning to the substantive application of qualified immunity, the Plaintiff has not asserted that these defendants were not similarly situated with defendants Brown and Fresenius. In fact, as set forth above, they are similarly situated. Thus, for the reasons set forth in the Court's June 7, 2001 Decision and Order, "arguable probable cause" existed for the arrest and detention of the Plaintiff and, therefore, these three defendants are likewise entitled to qualified immunity. See Cerrone v. Cahill, 95-CV-241, Decision and Order, June 7, 2001, Dkt. # 121.

Further compelling the Court's conclusion in this regard is the fact that the defendants' actions were taken based upon the totality of the circumstances set forth above. Even had the information not formed the basis of an appropriate probable cause determination, it certainly formed the basis of on objectively

reasonable belief that same existed. "[T]he question of immunity remains, as it should, distinct from the question of probable cause." Warren v. Dwyer, 906 F.2d 70, 75 (2d Cir.) (citation omitted), cert. denied, 498 U.S. 967 (1990).

Here, far from acting impulsively or "plainly incompetently," the defendants engaged in a lengthy investigation which yielded numerous affidavits and other evidence which cross-corroborated much of their suspicion that a joint effort within Troop K Barracks was occurring and that Cerrone was intertwined therein. Provost v. City of Newburgh, 2001 WL 930250, at *10 (2d Cir. Aug. 17, 2001)("This forgiving standard protects 'all but the plainly incompetent or those who knowingly violate the law.'")(quoting Malley v. Briggs, 475 U.S. 335, 341 (1986)). While the subjective beliefs of the defendants are not to be considered on a qualified immunity determination, Cerrone, 246 F.3d at 202, "for the purpose of qualified immunity and arguable probable cause, police officers are entitled to draw reasonable inferences from the facts they possess at the time of a seizure based upon their own experiences." Cerrone, 246 F.3d at 203. Put another way, "a court must evaluate the objective reasonableness of the [officer's] conduct in light of clearly established law and the information the officers possessed." Cerrone, 246 F.3d at 202. Here, based upon all of the information available to the officers at the time of the arrest, it cannot be said that the officer's "judgment was so flawed that no

reasonable officer would have made a similar choice." Lennon v. Miller, 66 F.3d 416, 425 (2d Cir. 1995).

Given the totality of circumstances presented to these officers, reasonable officers, if they did not agree that probable cause actually existed, would certainly disagree whether it did. The only conclusion a reasonable jury could make, if it too did not conclude that actual probable cause existed to detain Mr. Cerrone as defendants did, is that reasonable officers would disagree on the constitutionality of the seizure. Cerrone, 246 F.3d at 203. Therefore, the Court finds that each of the three defendants is entitled to qualified immunity on Plaintiff's claims brought under 42 U.S.C. § 1983. Defendants motion is, therefore, **GRANTED** on this basis.

C. State Law Claim "Intentional Infliction of Emotional Distress"

Defendants argue that the Plaintiff's cause of action brought under the theory of intentional infliction of emotional distress should be dismissed because he cannot present facts to satisfy a *prima facie* case under New York law. The Court agrees.

Under New York law, a claim for intentional infliction of emotional distress requires a showing of: "(1) extreme and outrageous conduct; (2) intent to cause, or reckless disregard of a substantial probability of causing, severe emotional distress; (3) a causal connection between the conduct and the injury; and (4) severe emotional distress." Stuto v. Fleishman, 164 F.3d 820, 827

(2d Cir. 1999). Whether the conduct alleged may reasonably be regarded as so extreme and outrageous as to permit recovery is a matter for the court to determine in the first instance. See id. A litigant can establish a cognizable claim for intentional infliction of emotional distress "'only where the conduct has been so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized society.'" Howell v. New York Post Co., 81 N.Y.2d 115, 122 (1993) (quoting Murphy v. American Home Prods. Corp., 58 N.Y.2d 293, 303 (1983) (citing Restatement (Second) Of Torts, § 46 cmt. d). Because the requirements for sustaining a claim for intentional infliction of emotional distress "are rigorous, and difficult to satisfy," Howell, 81 N.Y.2d at 122, courts have declined to recognize such a claim in cases where alleged conduct was not sufficiently outrageous. See, e.g., Walentas v. Johnes, 683 N.Y.S.2d 56, 58 (1st Dep't), leave to appeal denied, 93 N.Y.2d 958 (1999); Bunker v. Testa, 652 N.Y.S.2d 181, 182 (4th Dep't 1996); Bell v. Slepakoff, 639 N.Y.S.2d 406, 407 (2d Dep't 1996).

Nothing in Cerrone's claim rises to this level of outrageous conduct. Further, he is unable to present any evidence from which a reasonable trier of fact could conclude that he suffered severe emotional distress. Defs.' Local Rule 7.1 Stat., ¶¶ 29-33. Therefore, defendants' motion for summary judgment on Plaintiff's

intentional infliction of emotional distress claim is **GRANTED** and this claim is **DISMISSED with prejudice**.

D. Sanctions

Finally, Defendants move for sanctions against the Plaintiff pursuant to Rule 11 of the Federal Rules of Civil Procedure on the grounds that the action was frivolous and instituted for vexatious reasons. Putting aside whether or not the motion for sanctions is procedurally proper, see Kron v. Moravia Cent. Sch. Dist., 2001 WL 536274, at *1 (N.D.N.Y. May 3, 2001), the Court finds that there is no basis for the imposition of sanctions here.

Rule 11 was created to deter dilatory and abusive tactics in litigation, and to streamline the litigation process by lessening frivolous claims or defenses. "[T]he standard for triggering the award of fees under Rule 11 is objective unreasonableness." Margo v. Weiss, 213 F.3d 55, 65 (2d Cir. 2000). The imposition of Rule 11 sanctions is discretionary and should be done with caution. Knipe v. Skinner, 19 F.3d 72, 78 (2d Cir. 1994). A court should impose sanctions only "if 'it is patently clear that a claim has absolutely no chance of success,' and all doubts should be resolved in favor of the signing attorney." K.M.B. Warehouse Distributors, Inc. v. Walker Mfg. Co., 61 F.3d 123, 131 (2d Cir. 1995) (quoting Rodick v. City of Schenectady, 1 F.3d 1341, 1350 (2d Cir. 1993)).

Defendants have put forth considerable evidence that the instant action was something of a *causes célèbres* funded and

promoted by the Police Benevolent Association, perhaps for the PBA's own institutional purposes. Valvo Aff., Ex. O. The evidence as to whether or not Cerrone himself thought the action was unjustified, however, is contradicted by Mr. Cerrone. Plt.'s Local Rule 7.1 Stat. ¶¶ 34-37. Upon this contradiction, the Court must look at the pleadings and the evidence proffered in the case to see whether the action violates the intention of Rule 11. The Court finds, without hesitation, that it does not.

Even assuming *arguendo* that Mr. Cerrone might have cast doubt on the merits of his case to his co-workers (and putting aside that he may have done this simply to foster a working relationship with the very people he was suing), the history of the case demonstrates that there was a basis in law for his claim. Further, while he did not ultimately succeed there existed an arguable factual basis for his claim. Indeed, as evidenced by this and the previous Decisions from this Court, the Court has grappled with the many "close calls" arising from the evidence in this matter. The Court cannot conclude that Plaintiff's claims were "so completely without merit ... that they must have been undertaken for some improper purpose ... ." Salovaara v. Eckert, 222 F.3d 19, 35 (2d Cir. 2000). There is no basis, in this Court's opinion, to impose Rule 11 sanctions. Defendants' motion, in this regard, is **DENIED.**

III. CONCLUSION

Based upon the above, Defendants' motion for summary judgment

is in all respects **GRANTED** and all claims against **Michael F. Cahill, Salvatore S. Valvo, and Richard G. Morse** are hereby **DISMISSED WITH PREJUDICE**. The Clerk of the Court is directed to enter judgment for the defendants and to close the case.

IT IS SO ORDERED.

September ___, 2001

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Hon. Thomas J. McAvoy
U.S. District Judge